Supreme Court, U. S.
FILED
NOV 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-540

CITY OF CHICAGO, a municipal corporation, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, Commissioner of the Chicago Board of Health, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

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CONCERNING RESPONDENT'S COUNTERSTATEMENT OF THE CASE

(a) The statement in respondent's brief in opposition (p. 2) to the effect that out-of-state inspections by the City of Chicago are not required by the Chicago ordinance but are dictated by mere board of health policy, is inaccurate.

Section 154-17 of the Municipal Code of Chicago provides:

> "*154-17. Inspection of dairy farms and milk plants.* At least once during each inspection period the board of health shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city . . ."

Section 154-19 of the Municipal Code of Chicago does state:

> "*154-19. Products shipped from beyond limits.* Milk and milk products from points beyond the limits of inspection may not be sold in the city unless produced and pasteurized under provisions identical with those of this chapter and approved by the board of health. In order that inspections by the board of health may be adequate, thorough, and effective, the board of health may confine its inspections within such points and territorial limits as the board of health may, from time to time, deem necessary to insure economic and proper supervision, and to safeguard and promote the public health of the city."

The ordinance is thus couched in terms of "the limits of inspection." The limits of inspection are not determined by the state boundaries of Illinois, but by what is administratively feasible. Section 254-19 allows the city, in an emergency, to receive milk from distant points on the basis of reciprocity. However, board of health officials testified that they were prepared to send Chicago inspectors "anywhere."

Dixie's pasteurization plant is not lcoated in Florida or California, but in Gary, Indiana—less than 50 miles from the city limits of Chicago. Dixie's plant and supplying farms are all well within the limits of routine inspection by Chicago inspectors. They have in fact all been inspected by Chicago inspectors, pursuant to a discovery order entered by the district court. That there is

nothing unusual in such inspections is proven by the fact that the Indiana State Board of Health routinely inspects more than 500 dairy farms in Illinois, Michigan and Ohio (T. 222, 223).

(2) Respondent's assertion (Brief in Opposition, p.2) that Chicago's representation (Petition, p.12) that Dixie has not sought a Chicago permit since 1955 is "patently false" is not borne out by the record. Dixie's last actual application for a Chicago permit was in 1955. (T. 271.) If Dixie's application was wrongfully frustrated in 1955, as Dixie insinuates, Dixie certainly was guilty of laches in waiting until December 23, 1970—15 years later—before seeking equitable relief.

Dixie's account of its 1969 oral inquiry about the possibility of obtaining a Chicago permit does not make sense. Respondent asserts that the chief sanitarian for the Chicago Board of Health, James Meany, told Dixie's representative that "its application would be 'futile' because there was currently pending before a committee of the City Council a bill to permit reciprocal inspection and no action could be taken until passage of the bill" (Brief in Opposition, p.3). Such pendency of an amendment would not make an application by Dixie futile; it merely offered the possibility that Dixie's obtaining a Chicago permit might be simplified if the bill was adopted. Dixie's representative in that conversation, Jorgen Andersen, the company's secretary, testified that Meany told him the amended ordinance would probably be ready in "a month or five weeks" (T. 283). But the proposed amendment was rejected by the city council. In any event, Dixie did not apply for a Chicago permit in 1969, but at most made a feeble oral inquiry about the possibility.

(3) Respondent's claim (Brief in Opposition, p. 3) that it was merely "in an obvious attempt to moot the lawsuit" that Chicago, after inspecting Dixie pursuant to a district court order, passed Dixie, is no more than partisan speculation. Chicago inspected Dixie and its farms twice. The first time Dixie flunked. It can be reasonably assumed that Dixie then made some corrections. Then Chicago reinspected Dixie, as respondent admits (Brief in Opposition, p.10), gave it a passing grade and offered it a permit.

(4) The discrimination issue was eliminated from this lawsuit by the district court's striking the discrimination count and by Dixie's failure to appeal that ruling. The opinion of the court of appeals (App. 332) so notes and states;

> "[T]he issue of discrimination was removed from the case and is not before us."

Nevertheless, despite this statement, the court of appeals held (App. 37a, 38a) that the district court was entitled to draw the inference that "the reason for the failure of out-of-state processor to obtain permits has been the duplicative inspection requirement of the Chicago ordinance . . . notwithstanding the paucity of direct evidence on this subject."

(5) The brief in opposition (p. 4) is in error in asserting that Chicago's thesis "that the additional inspection conducted by the City of Chicago Board of Health better insures the safety of the milk to Chicago residents" was found by both the district court (Finding 12, App. 8a) and the court of appeals (App. 40a, n. 13) to be "totally unwarranted". The references do not substantiate the assertion. The district court's Finding 12 states no more than that Dixie's milk is wholesome and that "Chicago

can rely upon Indiana and U.S. P.H.S. inspection to fully protect Chicago's health interests." Footnote 13 in the court of appeals' opinion likewise says nothing about the claim of Chicago, that its additional inspection better insures the safety of milk consumed by Chicago residents, being totally unwarranted. On the contrary, the opinion notes that Indiana "failed to assess demerits for cattle drinking cups which were fed by submerged inlets, although such devices are not permitted by the model ordinance." However, the court of appeals chose to regard this as a "minor variance[s]", although under the model ordinance promulgated by the USPHS, the item of cattle drinking cups fed by submerged inlets is grave enough to draw a demerit of 5 points, where 90 out of a possible 100 points is passing.

It is obvious to common sense that double-checking what has been checked by someone else is more reliable, more adequate than relying upon a check by someone else. In matters of safety, we reiterate, maximum safety is a matter of right.

ARGUMENT

I.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE RULING OF THIS COURT IN *DEAN MILK COMPANY v. CITY OF MADISON, WISCONSIN.*

Respondent has made an heroic attempt in its Brief in Opposition (pp. 6,7) to convolute *Dean Milk Company v. Madison*, 340 U.S. 349 (1951), to its own uses, but even its skill is unequal to that impossible task.

Nowhere in the majority opinion of this Court in that well-known case is it assumed that "Madison's interests were *not* adequately protected . . . by Illinois inspection." as the Brief in Opposition (p.6) asserts (emphasis supplied by respondent), and that "therefore . . . [this Court] spoke of Madison's right to conduct its own inspection" (idem.). On the contrary, this Court stated in *Dean* (340 U.S. at 354),

> "this regulation . . . in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."

Nor did *Dean* require the municipality to choose "the least burdensome alternative", as the Brief in Opposition (pp. 6,7) strives to imply. On the contrary, the opinion of this Court declared (340 U.S. at 355):

> "It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors . . . [A]n alternative proposal [is] based on § 11 of the Model Health Ordinance recommended by the United States Public Health Service."

This Court held that since Madison had both these alternatives open to it, the ban on all but local milk was "not essential for the protection of local health interests and place[d] a discriminatory burden on interstate commerce."

The respondent's discussion (Brief in Opposition, pp. 2,3) of Justice Black's dissenting opinion in *Dean* (340 U.S. at 357-360) is even more confused. Respondent portrays the Black dissent as stating that "the *Dean* holding meant that if it could be shown that Madison's health interests were adequately protected by Illinois inspection, Madison would be required to rely on that inspection because it was the least burdensome alternative."

Nowhere in his dissent did Justice Black say anything of the sort. On the contrary, he declared (at 360), "I do not think that either of the alternatives suggested by the Court would assure the people of Madison as pure a supply of milk as they receive under their own ordinance."

It was Justice Black's opinion (at 357) that, "[a]s a practical matter . . . Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison." The applicability of this observation to Dixie in the case at bar is obvious. Not Chicago's ordinance, but Dixie's own unwillingness to submit to Chicago inspections is keeping Dixie out of the Chicago market.

With his characteristic candor Justice Black then went on to declare (at 359, 360):

> "No case is cited, and I have found none, in which a bona fide health law was struck down on the ground that some other method of safeguarding health would be as good as, or better than, the one

> the Court was called on to review. In my view, to use this ground now elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk."

Both of the valid alternatives adumbriated in the majority opinion in *Dean* Justice Black thought inferior to the Madison ordinance. He criticized the system of fees for on-site inspection, suggested by the majority, as bound to lead to litigation over calculation of the charges. That criticism has been obviated in the Chicago ordinance, since Chicago makes such inspections without charge and at its own expense.

The reciprocity system based on the U.S.P.H.S. model ordinance Justice Black considered markedly inferior (at 259, 360). He noted that the model ordinance requires reliance on "spot checks . . . based on random selection of farms and pasteurization plants," that "the United States Public Health Service rates the ten thousand or more farms in the Chicago milkshed by a sampling of no more than two hundred farms," and "[t]he same sampling technique is employed to inspect pasteurization plants." The result, Justice Black stated, is "neither the farms supplying Dean with milk nor Dean's pasteurization plants were necessarily inspected in the last 'spot check'."

We are confident Justice Black would think no more highly of Dixie's arguments in the case at bar.

The court of appeals was not misled by the respondent's attempt to rewrite *Dean*. However, as has already been noted in our petition for certiorari (pp. 26,27), that court was of the opinion that *Dean* had been modified by this Court's recent ruling in *Great Atlantic and Pacific Tea v. Cottrell*, ... U.S. ....., 47 L. Ed. 2d 55.

Cottrell was decided on February 25, 1976, more than a month after oral argument was had in the court of appeals in the instant matter on January 19, 1976.

In holding *Cottrell*, with *Pike*, determinative here, the court of appeals declared (538 F. 2d at 1307; Petition, App. p. 34a):

> "Before the formulation of the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and the reaffirmation of that test in *Great Atlantic and Pacific Tea Co. v. Cottrell*, the argument in favor of the constitutionality of the Chicago milk ordinance would have been more persuasive."

The court of appeals then went on to find *(Idem)*:

> (1) The Chicago ordinance does not purport to discriminate against interstate commerce;
>
> (2) The policy decision and legislative judgment underlying a state regulation designed to protect the public's health or safety are not subject to review by a federal court;
>
> (3) The burden the Chicago ordinance lays on interstate commerce is "incidental";
>
> (4) The Chicago ordinance is not inconsistent with the regulations of other states in a field in which uniformity is important to the national interests in unimpeded commerce; and
>
> (5) The added expense to interstate businesses of complying with the regulation would not justify a court in striking it down.

Nevertheless, despite all these findings in favor of the Chicago ordinance, the court of appeals held that the reference in *Dean* to the two permissible alternatives open to a municipality of choosing between reliance on reciprocity and of making its own inspections, no matter where, is now "qualified" by the phase "[i]n the absence of adequate assurance that the standards of a sister state, either as constituted or applied, are substantially

equivalent to its own," with the result that, if such "adequate assurance" is present, then the municipality is stripped of the power to make its own on-site inspections.

Pike and *Cottrell* are not applicable. They were not health, but economic cases, aimed directly at impeding interstate commerce. *Pike v. Bruce Church, Inc.*, 397 US 137 (1970), concerned an Arizona statute that prohibited the shipment of cantaloupes grown in Arizona out of that state unless they were first packed in an Arizona packing facility. *Great Atlantic and Pacific Tea Co., v. Cottrell*, ... U.S. ..... 47 L. Ed. 2d 55 (1976), had to do with a Mississippi statute that did not permit the shipment into that state of milk from another state, unless the other state accepted Mississippi milk on a basis of reciprocity. Both of these measures were disruptive of the national common market created by the Commerce Clause of the Constitution.

We respectfully submit that the language in *Pike* and *Cottrell* concerning balancing alternatives and requiring selection of the alternative that least burdens interstate commerce was actually unnecessary to the results reached there and is *obiter dicta*. The Arizona and Mississippi statutes in those cases were both *per se* impermissible interferences with interstate commerce.

But state or local legislation, enacted under the police power of the state or municipality to protect the health of the community, is permissible, even though it may have some effect on interstate commerce. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829); *License Cases*, 5 How. 504, 12 L. Ed. 256 (1847); *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1939); *Milk Board v. Eisenberg*, 306 U.S. 346 (1939); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525

(1949); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1968).

The opinion of the court of appeals loses sight of the fact that it is dealing with the validity of legislative action in the proper domain of health regulation, and that this is presumptively valid unless the party attacking the legislation demonstrates the contrary by clear and convincing evidence. The burden should not be placed on the state or local government to justify its legislation as the measure with the least impact on interstate commerce.

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, at 729, 730 (1963). As this Court stated in *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, at 423 (1952),

> "[W]e do not sit as a superlegislature to weigh the wisdom of legislation."

II.

RESPONDENT HAS FAILED TO PROVE THAT THE CHICAGO ORDINANCE BURDENS INTERSTATE COMMERCE.

Nowhere does the respondent respond to our observation (Petition, p.30) that no Indiana farmers testified that they could not or would not sell milk to Dixie if they had to submit to Chicago inspections. Nowhere does respondent address itself to our criticism of the meager testimony of its president, Mr. Eskilson, and its long-time employee, Mr. Kjos, as to their guesses what might happen if Dixie complied with the Chicago ordinance (Petition, pp.30, 310. The testimony of Eskilson and Kjos refutes itself by its flimsy inconsequentiality.

Nowhere has respondent come to grips with our comment on the failure of any representative of a single out-of-state milk company other than Dixie to testify against the Chicago ordinance or declare under oath that their company was unfairly excluded from Chicago.

The various out-of-state milk companies mentioned in district court finding 17 (Petition, pp.10a, 11a) did not apply for Chicago permits. They inquired whether they could enter the Chicago market on the basis of reciprocity—that is, on their own terms. To paraphrase Justice Black, it is not Chicago's ordinance, but their own unwillingness to comply with the Chicago ordinance and undergo Chicago inspections that keeps them out of the Chicago market.

The opinion of the court of appeals (Petition, p.36a, fn. 9) notes,

> "Three out-of-state plants holds Chicago permits. Dixie characterizes them as 'branch plants owned by Chicago dairies to which the city responds that one of them, Borden, is a national company with only a regional office in Chicago."

In any event, no matter who owns these plants, it is undisputed that they are all located in Wisconsin—in Fond du Lac, Whitewater and Janesville. These are not mere farms, but pasteurization plants. No doubt they are manned by local employees.

There is no evidence in the record that Chicago administers its ordinance unfairly or dilatorily. The opinon of the court of appeals acknowledges (Petition, p.38a) there is a "paucity of direct evidence on this subject" of alleged deterrence of out-of-state milk processors by Chicago inspection requirements.

If Dixie, or any other out-of-state milk processor, wants to sell its milk in Chicago it should comply with

the Chicago ordinance, the terms of which are not onerous, but reasonable. If, in practice, Chicago treats the application unfairly, then and only then should Dixie or any other processor be afforded equitable relief.

III.

THE COURT OF APPEALS ACCEPTED THE FINDINGS OF THE DISTRICT COURT UNCRITICALLY.

The Brief in Opposition (p. 10) fails to respond to our observation (Petition, pp.32, 33) that the opinion of the court of appeals repeatedly accepts the findings of the district court as evidence (App. 37a, 38a, 39a)—findings that were prepared by respondent's counsel.

Respondent notes (*idem.*) that "upon the re-inspection, Chicago passed Dixie's farms." Thus, respondent admits that, before Chicago offered Dixie a permit, Chicago inspected Dixie's farms twice, pursuant to the discovery order. It can be reasonably assumed that some corrections were made on the Dixie farms in the interim. Otherwise, why the second inspection? The assertion in the Brief in Opposition (p.10) that "[a]t the time of the second inspection, there had been no changes in the drinking cups," is without support in the record.

IV.

THE OPINION OF THE COURT OF APPEALS DOES MAKE THE VOLUNTARY RECIPROCITY PROGRAM COMPULSORY.

Respondent's statement in its Brief in Opposition (p. 10) that "Dixie did not seek to force the City to accept reciprocity, nor does Judge Tone's opinion require such acceptance," evinces a remarkable lack of realism.

Under *Dean v. City of Madison*, Chicago had two alternatives: (1) conduct its own inspections or (2) rely on reciprocity. The opinion of the court of appeals, in the belief that *Dean* had been modified by *Cottrell*, affirms

an injunction against Chicago making its own inspection of Dixie's Indiana plant and dairy farms.

That clearly results in requiring Chicago to permit Dixie's Indiana milk to be sold in Chicago on the basis of the Indiana inspection, accepted reciprocally. For Chicago cannot exclude out-of-state milk from Chicago, even if it wanted to (which it does not), for that would constitute an unconstitutional embargo on interstate commerce.

Thus, without any preempting legislation by the Congress, the ruling of the court of appeals converts the voluntary reciprocity program sponsored by the USPHS into something the City must accept.

This determination deprives the City of Chicago of its right, established since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 235 (1929), to enact and enforce local health and safety measures—in the absence of preempting federal legislation—even though the legislation affects interstate commerce.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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